Supreme Court
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No.

In the

Supreme Court of the United States

JOSETTE DUMONT DECARLO,
Executrix of the Estate of Daniel S. DeCarlo,

Petitioner,

vs.

ARCHIE COMIC PUBLICATIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this case, Petitioner submits that local District Court rules have been applied in a way that directly conflicts with the summary judgment standards of FRCP 56. The result is a widespread denial of the right to trial by jury for civil litigants. This case involves a motion for summary judgment in a copyright litigation brought by Plaintiff, a comic book publisher, against the widow of an artist who formerly did contract work for Plaintiff. As part of its motion for summary judgment, pursuant to Local Civil Rule 56.1 of the Southern District of New York, Plaintiff submitted a 238-paragraph statement of supposedly material facts as to which Plaintiff contended there was no genuine issue to be tried. In response, Petitioner, a private individual, submitted a short concise statement with evidentiary citations identifying several material issues of fact which were sharply disputed and which required trial by jury. Invoking Local Rule 56.1, the District Court sharply criticized Petitioner for not responding to every one of Plaintiff's several hundred factual contentions. The District Court went on to resolve the factual issues presented by Petitioner itself, and grant summary judgment to Plaintiff. The Court of Appeals affirmed.

Does EDNY/SDNY Local Court Rule 56.1, as implemented by the District Courts with the approval of the Second Circuit Court of Appeals:

1. Convert Rule 56 Summary Judgment into "trial by affidavit"?

2. Disregard Supreme Court criteria for determining the existence of "genuine issues of material fact"?

3. Deprive non-movants of trial by jury?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

JOSETTE DUMONT DeCARLO, Executrix of the Estate of Daniel S. DeCarlo, Petitioner.

ARCHIE COMIC PUBLICATIONS INC., Respondent.

Counter-Defendants in District Court but not direct parties to Petition:

AMERICAN BROADCASTING COMPANIES, INC.

RICHARD H. GOLDWATER

MICHAEL I. SILBERKLEIT

JOHN DOE

RICHARD DOE

ARCHIE COMICS ONLINE, INC.

GREGORY BATTERSBY

CHARLES W. GRIMES

Counsel for Respondent, Archie Comic Publications, Inc. ("ACP"), a private non-governmental party, certified to the Court of Appeals below that ACP has no parent corporation and that no publicly held company owns 10% or more of its stock.

American Broadcasting Companies, Inc., a named party in the District Court but not on this Petition, is understood from public information on *The New York Times* web site, to be owned by The Walt Disney Company (Holding Company). Information as to other owners of the company's stock, if any, is unknown to Petitioner's undersigned counsel. Likewise, present ownership of Archie Comics Online, Inc. is unknown to Petitioner's counsel.

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Citations of the Official and Unofficial Reports of Opinions and Orders Entered in the Case

The District Court's Memorandum Opinion (On Reconsideration) was filed by Honorable Lewis A. Kaplan on April 23, 2003, and is reported at 258 F. Supp.2d 315 (SDNY, 2003). It is reproduced in the Appendix. Other relevant Decisions and Orders embraced by this appeal include Judge Kaplan's earlier opinion reported at 141 F. Supp.2d 428 (SDNY, 2001). All are reproduced in the Joint Appendix filed in the Court of Appeals at A-123, A-131, A-133, and A-141. Also relevant is Judge Kaplan's opinion reported at 127 F. Supp.2d 497 (SDNY, 2001) and opinions and orders reproduced in the Joint Appendix filed in the Court of Appeals at A-167 and A-183.

Basis for Jurisdiction in Supreme Court

The judgment of the SDNY District Court was entered on June 12, 2003, and was affirmed by Summary Order of the Second Circuit Court of Appeals on March 3, 2004. Mandate was issued on March 25, 2004.

No request for rehearing was made in the Court of Appeals.

The statutory provisions believed to confer on the Supreme Court jurisdiction to review on writ of certiorari the summary order of the Court of Appeals affirming the judgment of the District Court are 28 U.S.C. Sections 1254 and 2101.

Constitutional Provisions, Rules and Regulations Involved In The Case

United States Constitution

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure

Rule 36. Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient

to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a

declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with out without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.***

(c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. ***

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not

so respond, summary judgment, if appropriate, shall be entered against the adverse party.***

Rules of the United States District Courts for the Southern and Eastern Districts of New York (Effective April 15, 1997, Amended to July 1, 2003)[1]

Rule 56.1 Statement of Material Facts on Motion for Summary Judgment

(a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

(d) Each statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).

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[1] The Boards of Judges of the Eastern and Southern District of New York amended Local Rule 56.1 on February 26, 2004, effective March 26, 2004 (subsequent to the proceedings in this case) in a manner to further burden non-movants and facilitate dispositions of factual issues on paper rather than before a jury in the courtroom. See: www.nysd.uscourts.gov/rules/rules.htm.

Copyright Office Rules

Circular 44, Cartoons and Comic Strips:

The copyright law of the United States (Title 17 of the United States Code) provides for copyright protection of literary and artistic works. Copyright protection begins automatically when a work is first created in a fixed form. Cartoons and comic strips are among the types of works of authorship protected by copyright. This protection extends to any copyrightable pictorial or written expression contained in the work. This protection does not extend to the title or general theme for a cartoon or comic strip or to the general idea or name for the characters depicted. Intangible attributes of characters are not copyrightable, but a drawing, picture, or depiction or a written description of a character may be registered for copyright. However, copyright does not extend to the idea for the character itself. A character may be protected under aspects of state, common, or trademark laws. Likewise, titles and names may sometimes be protected under state law doctrines or state and federal trademark laws, but such protection is not provided for in the copyright code. Consult an attorney for details.

Statement of the Case

Subject matter jurisdiction in the District Court in actions 00 CV 5686 (LAK) and 02 CV 8466 (LAK) was founded on 28 U.S.C. 1331, 1338, 1367 and 2201. The counterclaims were founded on 28 U.S.C. § 1367. The appeal to the Court of Appeals was from a Final Judgment and Permanent Injunction entered on June 13, 2003 that disposed of all parties' claims in both actions. (Set forth in Appendix C.)

The Court of Appeals' jurisdiction was based on 28 U.S.C. § 1291. The case below presented important questions of interpretation and application of the Copyright Acts of 1909 and 1976.

Archie Comics Publications, Inc., a comic book publisher, filed a complaint seeking declaratory judgment from the District Court that it was the sole owner of three groups of profitable comic book characters originally created in 1960, 1962 and 1982 by freelance comic book artist Daniel DeCarlo, who supplied comic book illustrations to the publisher as an independent contractor for over 40 years. The publisher filed a motion for summary judgment, accompanied by a 238-paragraph "Statement of Undisputed Facts" pursuant to Local Rule 56.1, accompanied by a foot-high pile of documents, a large number of which had never been produced in discovery.

Counsel for the non-movant defendant/counterclaimant artist responded with a counter-statement of genuine issues of material fact identifying a short list of key factual disputes as to each group of cartoon characters (set forth at pp. A-282-A-287 of Joint Appendix in Court of Appeals) the key ones of which, for purposes of this Petition, were the following:

> Pursuant to Local Rule 56.1, defendant respectfully submits that the following genuine issues of material facts are sharply disputed and should be submitted to the trial jury:
>
> * * *

A. *Josie Characters* ***

6. Was Defendant's silence regarding ACP's licensing of Josie and the Pussycats intended by him to mislead Plaintiff into believing that ACP owned the copyright in the original Josie comic strip depictions of the characters and calculated to prevent ACP from learning the truth? (See DeC. Tr.-1 at 145-147; 176-180; 187; 214 -217; 219; 221-225; 269-27; DeC. Tr.-2 at 106-109; 234-236; 332-335; 425-426; Ex. 28; Seymour Dec. Exs. A, B, C).***

B. *Sabrina characters.* ***

3. Were the original model sheet depictions of the Sabrina characters "works for hire"? (See DeC. Tr.-2 at 1922; 28-31; 83-84; 90-96; 97-1033; 130; 155; 157; 337-338;406-410; 410-414; 428-429; Ex. 28; Seymour Decl. Exs. A, B, C).

4. Did the 1988 or 1996 agreements transfer ownership of the copyrights in Mr. DeCarlo's original model sheet depictions of the Sabrina characters to ACP? (See DeC. Tr.-1, Exs. 47 and 49; DeC. Tr-2 at 134-135).***

C. *Cheryl Blossom Characters.* ***

3. Did the 1988 or 1996 agreements transfer ownership of the copyrights in Mr. DeCarlo's original model sheet depictions of the Cheryl Blossom characters to ACP? (See DeC. Tr.-1, Exs. 47 and 49). ***

The District Court castigated DeCarlo's counsel for failure to respond "appropriately" to the remaining 200-plus paragraphs in the movant's Rule 56.1 statement, and then the District Court proceeded to weigh the evidence, draw factual inferences and make findings of fact holding against the artist on the four key issues above on which he sought a jury trial. (The Court's full opinion is set forth in Appendix A.)

The Court of Appeals affirmed by summary order. (Appendix B.)

ARGUMENT

Why Certiorari Should Be Granted

Petitioner asserts that the Second Circuit Court of Appeals, by approving the District Court's use of EDNY/SDNY Local Rule 56.1 to marshal the evidence and make findings of fact on all factual issues, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's supervisory powers. (See S.Ct. Rule 10(a).) Furthermore, since *all* of the other District Courts in the Second Circuit have substantially similar Local Rules – which presumably are widely copied in other Districts in other Circuits, the questions presented here raise an important question of federal law that has not been, but should be, settled by this Court. (S.Ct. Rule 10(c).)

1. AS APPLIED BY THE COURTS IN THE SECOND CIRCUIT, LOCAL RULE 56.1, VIOLATES THE VERY PURPOSE OF SUMMARY JUDGMENT BY SUBSTITUTING A VOLUMINOUS AND TIME-CONSUMING TRIAL BY AFFIDAVIT IN PLACE OF SPEEDY JURY RESOLUTION OF FACTUAL DISPUTES

EDNY/SDNY Local Rule 56.1 (set forth above) appears unobjectionable on its face when read in conjunction with Federal Rule 56. However, in actual practice, the Local Rule as applied in this and other cases [and as recently amended (see fn.1)] completely alters and frustrates the purpose of summary judgment. This is how the District Court below interpreted and applied Local Rule 56.1 in this case:

> In order for a Rule 56.1 statement in opposition to a motion for summary judgment to serve this purpose *it must respond appropriately to the movant's statement.* Thus, "[a] proper Rule 56.1 statement submitted by a non-movant *should consist of a paragraph-by-paragraph response to the movant's Rule 56.1 statement* much like an answer to a complaint" *and must cite*

admissible evidence in support of the non-movant's contention that there is admissible evidence creating a genuine issue for trial. And *while it "is permissible for the non-movant to provide a separate statement*, apart from this paragraph-by-paragraph response, in which it lists other facts it claims to be in dispute . . .[,] *this separate statement is not a substitute for the paragraph-by-paragraph response*. The non-movant, particularly if represented by counsel, should not leave it to the Court to cull from this separate statement the pieces of evidence which would support the contentions of the non-movant asserted in its paragraph-by-paragraph response without citation."

Defendant has ignored these requirements. *Plaintiff submitted a detailed, 238-paragraph Rule 56.1 statement, each and every paragraph containing citations to the evidence upon which plaintiff relies for the asserted proposition*. Defendant's responding statement, however, leaves the Court at sea as to the basis for defendant's contentions that there are genuine issues of material fact.

The section of defendant's Rule 56.1 statement that responds to ACP's statement contains three parts. The first lists the numbers of the paragraphs of ACP's statement that plaintiff does not dispute, which is entirely appropriate. The second is a list of 109 paragraph numbers which defendant disputes "on the grounds that they are variously inaccurate, misleading, irrelevant, hearsay, argumentative and/or incomplete." *It is utterly unsupported by any citations to the record*, instead referring the Court to all of the transcripts and other sources cited by ACP "for an accurate presentation of the facts" *although it must be noted that defendant's Rule 56.1 statement contains also a section, not directly responsive to ACP's statement, in which she asserts that certain enumerated propositions – many of which are conclusions of law and not factual assertions at all –*

> *are disputed and includes some record citations*. The third lists 78 paragraphs which, defendant contends, she cannot admit or deny "because they relate to transactions and discussions conducted out of [DeCarlo's] presence, without any participation, knowledge or consent on his part."
>
> *This response is utterly insufficient*. To the extent that defendant denies the assertions of plaintiff's Rule 56.1 statement, she has declined to provide citations to the record supporting her claim that certain of the movant's statements of allegedly undisputed facts actually are disputed. She instead has left the Court to "scour the record on its own in a search for evidence . . . that a certain fact is in dispute" and to seek "to cull from [her] separate statement the pieces of evidence which would support the contentions . . . asserted in [her] paragraph-by-paragraph response without citation." In substance, the Court is asked "to peruse a haystack looking for needles." *To the extent she denies the ability to admit or deny those assertions, her response also is insufficient because alleged inability to admit or deny is no excuse*, at least in the absence of a sufficient Rule 56(f) affidavit, and none has been submitted here.

258 F. Supp.2d 315, 317-319 (Reproduced in the Appendix at A-5–A-8) (fn. omitted.) (Emphasis added.)

Requiring a "paragraph-by-paragraph response" to every single factual assertion by a moving party – no matter how trivial or irrelevant (in this case, a 238-paragraph statement of facts – most of which are *not* material to the outcome of this case as defined in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)), converts motions for summary judgment into make-work, costly and time-consuming exercises, whose sole purpose is to facilitate judicial dispositions on the papers without trial.

2. LOCAL RULE 56.1, AS INTERPRETED BY THE DISTRICT COURTS AND CONFIRMED BY THE COURT OF APPEALS, REQUIRES THE NON-MOVANT TO PRESENT HIS ENTIRE CASE IN RESPONSE TO THE MOVING PARTY'S STATEMENT OF MATERIAL FACTS – NOT SIMPLY TO SET FORTH "SPECIFIC FACTS SHOWING THERE IS A GENUINE ISSUE FOR TRIAL" AS DIRECTED BY FEDERAL RULE 56.

The District Courts by their Local Rule 56.1, have converted a motion for summary judgment into a blunderbuss Rule 36 Request for Admissions – but with none of the protections provided under that Rule [*e.g.*, 30 days to respond; right to object to particular requests; procedure to resolve objections; further opportunity to respond.]

The District Court's requirement that the non-movant must reply in detail to every one of 238 separate numbered factual assertions, and provide specific citations to *all* relevant evidence as to each paragraph – and to do so under extreme time pressure – instead of simply complying with Rule 56 by identifying the key issues of material fact, is unreasonable in itself, particularly for parties of limited resources represented by small firms or solo practitioners, particularly those (as in this case) working *pro bono*.

But the real harm is that Rule 56.1 virtually guarantees a well-heeled corporate party that it will escape a jury trial and delay final disposition of a case for months or years simply by serving a voluminous statement of facts with a motion for summary judgment. Local Rule 56.1 pressures the courts to dispose of cases by resolving factual issues themselves instead of sending them out to trial.

The whole purpose of Federal Rule 56 – to provide a method for promptly disposing of actions in which *there is no genuine issue* as to any material fact – has been thwarted and frustrated by the District Court requirement of "a paragraph-by-paragraph response to the movant's Rule 56.1

statement" *in addition to* the non-movant's separate statement of genuine issues. Such a separate detailed statement can serve no purpose except to encourage paper trials of the entire case.

This perversion of Rule 56 is directly contrary to Supreme Court decisions describing the role of the District Court in passing on motions for summary judgment:

> *** At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, at 249-250 (1985).

The *only* statement that is or should be required from the non-moving party under Fed.R.Civ.P. Rule 56 is whether the non-movant contends there is a genuine issue as to any material fact requiring resolution by a trier of fact, and, if so, a specification of *the evidence showing the existence of such an issue*. As this Court has said:

> Rule 56(e) provides that, when a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

(*Ibid.* at 250) (Footnotes omitted.)

The Second Circuit has wandered away from this straightforward judicial function into a procedure that invites District Courts to resolve all issues of fact – material or otherwise – on the papers filed by the parties. This is a plain misuse of the summary judgment procedure:

> If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself *not whether he thinks the evidence unmistakably favors one side or the other* but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict* – "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Munson, supra* at 448.

(*Ibid.* at p.252) (Emphasis added.)

The District Court violated the judicial role delineated above, and the Court of Appeals perfunctorily approved the District Court's misappropriation of the jury's role with its summary order.

3. LOCAL RULE 56.1 SUBSTITUTES A PAPER TRIAL FOR A LIVE WITNESS TRIAL BY JURY, IN VIOLATION OF THE SEVENTH AMENDMENT

Instead of simply requiring the adverse party to provide a response that "must set forth specific facts showing that there is a genuine issue for trial", Fed.R.Civ.P. Rule 56(e), EDNY/SDNY Local Rule 56.1 requires the non-movant

to present a detailed statement of his full case, with citations to all supporting evidence, in a paragraph-by-paragraph response to the movant's "statement of material facts."

The non-movant is expected to prepare and serve such a detailed statement within a very short time after service of the movant's papers, creating an opportunity for the moving party to bury his adversary simply by serving a voluminous (in this case) 238-paragraph statement of purported material facts, accompanied by stacks of never-before-produced affidavits and documents (as in this case).

There are several adverse due process consequences from EDNY/SDNY Local Rule 56.1 (and its counterparts in other District Courts):

1. Summary Judgment becomes a cumbersome, time-consuming, costly procedure, instead of a method "for promptly disposing of actions in which there is no issue as to any material fact." See *Advisory Committee Note*, 1937 Adoption.

2. Instead of rendering a judgment "forthwith" (Rule 56(c)), the Local Rule bogs down the entire process, consuming far more time than conducting several jury trials end-to-end – in this case, a total of 18 months from the filing of the first motion paper (on 12/6/01) until the entry of the District Court's summary judgment (on 6/13/03) without even any oral argument. (During this protracted period in this case, the principal source of live testimony available for a jury trial – the 81-year-old freelance artist – died of pneumonia.)

3. The paragraph-by-paragraph detailed response required by the Local Rule irresistibly draws the District Court into disposing of the litigation "on the papers" by *actually deciding* all issues of fact (and necessarily doing so *in favor of* the moving party – there being no other choice available), thus terminating the case with the help of law clerks and without bothering with a jury.

All of these adverse due process consequences occurred in this case, in total disregard of basic hornbook rules of practice governing proper summary judgment procedure.

(a) The District Court Made Factual Inferences and Decided Disputed Questions of Historical Fact

As a general rule, disputed questions of historical fact should almost always be submitted to a jury for resolution. See *Moore's Federal Practice 3rd*, at § 56.1[5][b]:

> **[b] – Questions of Historical Fact and Mixed Questions of Law and Historical Fact Usually Should be Decided at Trial**
>
> In a case like the hypothetical automobile accident, the question of which party drove with the green light is what is termed by some commentators as a question of historical fact or the existence of fact. The definition of an historical fact is a matter about which the factfinder is called on to determine the unfolding of an event or the existence or nonexistence of a matter. This type of fact finding generally must be done at trial, not through summary judgment.
>
> Even if the determination of historical fact involves inference from facts rather than unearthing of facts, the making of the inference and the determination of the historical fact is usually held to be a jury question. Thus, questions of fact inference or fact assessment are also decisions properly reached at trial and not at summary judgment.

The *Josie* cartoon characters were created prior to 1960; the *Sabrina* cartoon characters were created in 1962; the *Cheryl Blossom* cartoon characters were created in 1982 – a spread of 18 to 40 years prior to the commencement of this litigation.

Throughout the case below there ran one critical and basic factual question: what constituted *the first creation "in a fixed form"* of each of the characters for purposes of copyright protection? (See Copyright Office Circular 44, set out *supra*) In the case of *Josie*, the first creation in a fixed form was as unpublished daily comic strips. In the case of the *Sabrina* and *Cheryl Blossom* cartoon characters, the first creations in a fixed form were pencil-drawn "model sheets" prepared by the cartoonist for the publisher's acceptance before the preparation and submission of any art work to illustrate the comic book stories. These original model sheets portraying the new characters were prepared by the artist to present the prototypes ("models") for an entirely new cast of characters who would later appear as illustrations in stories published in the pages of the comic books themselves. Once created, these character "prototypes" could then even be traced by other artists working for the publisher, and still maintain the same likenesses, style and appearance of the original creations. The key creative process was developing new characters who were fresh and unique and who could build a following among comic book buyers. The District Court acknowledged this use of model sheets, but then disregarded the conflicting model sheet evidence *in every one of its decisions* resolving issues of material fact.

Josie Characters

On the publisher's motion for summary judgment, the cartoonist asserted that the genuine issue of material fact as to *Josie* was whether ACP was deceived by DeCarlo into believing that it, the publisher, was the true copyright owner of the *Josie* characters (thereby equitably estopping him from claiming ownership himself).

This had been the subject of earlier litigation, but it then appeared in the case below that ACP had withheld critical documentary evidence in its possession that showed ACP explicitly recognized the cartoonist (DeCarlo) as "author" (*i.e.*, owner) of all comic book pages in which the cartoon

characters appeared, refuting any claim that ACP believed itself to be the owner (*i.e.*, "author"). The District Court turned ACP's withholding of these documents on its head, erroneously attributing the withholding to DeCarlo, not ACP – thereby making wholly improper witness credibility determinations on the issue:

> He [DeCarlo] has offered no explanation *for his failure* in that case to raise the contention he now makes. (A-26) (Emphasis added.)

Sabrina Characters

The District Court made two separate findings of fact on disputed material factual issues regarding the *Sabrina* cartoon characters. First, he transformed the 1962 payment for *comic book pages* depicting *Sabrina* into a finding that the payment for those pages also covered the original 1962 *model sheet* in which *Sabrina* was first created "in a fixed form", but for which no payment was ever separately made. The Court simply drew an inference of fact that payment for the comic book pages *also* covered the model sheet, an inference from conflicting evidence which only a trial jury could draw. Nevertheless, the Court squarely held, contrary to direct contradictory testimony, and with no mention of the existence of an issue of fact:

> DeCarlo was paid for his contributions to the *Sabrina* properties. (A–27)

Secondly, the District Court interpreted the ambiguous 1988 and 1996 artist contracts to include retrospective transfers of ownership of the *Sabrina* characters, despite the fact those contracts also make no mention whatsoever of "*model sheets*":

> *** [T]he 1988 Agreement assigned to ACP all of DeCarlo's "rights, title and interest in the Existing Third Party Works heretofore submitted to Archie" and conveyed to ACP any rights that DeCarlo had in

> any of the comic strips and pages that he previously had "submitted to Archie," which included all of his *Sabrina* artwork. (fns omitted) (A-34)

Whether model sheets were covered by the ambiguous contract language was plainly a question that should have been decided by the jury.

Cheryl Blossom Characters

The District Court likewise interpreted the same ambiguous 1988 and 1996 artist contracts as transferring ownership of the *model sheet* depictions of *Cheryl Blossom* to Archie, this time by the Court denominating her as part of the Archie Family – a contract interpretation and factual inference drawn from conflicting evidence that should once again have been resolved by a trial jury:

> The *Cheryl Blossom* works are part of the *Archie* property. Paragraph 2(b) of the 1988 agreement provides that DeCarlo "hereby expressly waives all claims of right which [he] may have to any ownership interest in such works and/or the ARCHIE property." In consequence, ACP also is the owner of any copyright interests in the *Cheryl Blossom* property. Moreover, for reasons discussed above, DeCarlo assigned any rights he may have had to any such works in the 1988 and 1996 Agreements. (fn. omitted) (A-38)

(b) The District Court Never Seriously Considered the Need for a Jury Trial

Moore's Federal Practice 3rd, [§56.11[5][a], explains the basic process a District Court should follow when considering a motion for summary judgment – a process with which Local Rule 56.1 directly conflicts:

Court Must Determine if Need for Trial Exists, But Must Avoid Making Fact Findings or Credibility Determinations

[a] – Court Deciding Summary Judgment Motion Generally May Not Make Fact Findings

Courts ruling on summary judgment motions are to review the submissions of the parties and determine whether a factual dispute of sufficient magnitude exists to warrant trial. However, a court that is ruling on summary judgment may not resolve factual disputes or make credibility determinations. In determining whether a factual dispute warranting trial exists, the court must view the record in the case and the summary judgment submissions in the light most favorable to the nonmovant.

In other words, the court deciding a summary judgment motion is not to make a determination of any specific facts such as whether the stoplight was red or green when the defendant drove through the intersection. Rather, the court reviews the summary judgment motion and response papers and seeks to determine whether the record reveals a disputed factual issue material enough to require a trial and factfinder determination (usually by a jury) of the factual question. For example, if the defendant through affidavit claims the light was green in his favor, but an eyewitness at deposition testifies that the light was red against the defendant, there exists relevant and substantial evidence on both sides of the issue, creating a genuine dispute of material fact, which necessitates trial and precludes summary judgment.

The court on the basis of this hypothetically thin record could not determine whether the light was red or green unless it improperly weighed the evidence or deemed one witness more credible than the other.

(pp. 56-105 to 56-108) (footnoted citations omitted)

Nowhere in the opinions below do either the District Court or the Court of Appeals seriously consider whether the non-movant set forth facts or evidence raising genuine issues for trial.

The District Court ridiculed DeCarlo's statement of issues to be tried:

> *** although it must be noted that defendant's Rule 56.1 statement contains also a section, not directly responsive to ACP's statement, in which she asserts that certain enumerated propositions – many of which are conclusions of law and not factual assertions at all – are disputed and includes some record citations.

(A-7) (fn. omitted.)

The District Court then simply overruled and disregarded these issues, assuming the function of fact-finder on all disputed factual questions, usurping the jury's role and making the Court's own findings of fact.

Josie Characters

Here is non-movant DeCarlo's statement of the genuine issue for trial regarding *Josie*:

> Was Defendant's silence regarding ACP's licensing of Josie and the Pussycats intended by him to mislead Plaintiff into believing that ACP owned the copyright in the original Josie comic strip depictions of the characters and calculated to prevent ACP from learning the truth? ***

(p. 8, *supra*)

The statement is followed by eleven (11) citations to deposition testimony and four (4) separate documentary exhibits. (See Joint Appendix in Court of Appeals at A-283 and the related pages setting forth the actual evidence cited therein.)

Because there was an earlier decision on estoppel, the threshold question was whether to re-open that question in the light of newly-produced documents withheld by ACP (the beneficiary of the estoppel ruling) in the prior case. The Court below never mentioned that fact, but instead made a finding against DeCarlo based on the ruling that *the artist* had provided "no explanation" for failure to produce these documents – a credibility determination contradicting what the documents themselves showed on their face had actually transpired. (A-23–A-26)

Sabrina Characters

This is DeCarlo's statement of the genuine issue of material fact for trial regarding *Sabrina*:

> Were the original model sheet depictions of the Sabrina characters "works for hire"?

(p. 8, *supra*)

That statement is followed by twelve (12) citations to deposition testimony and four (4) separate documentary exhibits. (See Joint Appendix in Court of Appeals at A-283 and related pages containing the actual evidence.)

The Court below never even mentioned the model sheet issue, but instead made a sweeping factual finding that ACP paid DeCarlo "a sum certain" based on ACP's payment to DeCarlo for illustrating the first Sabrina story, and that ACP's identification of DeCarlo as "author" on check endorsements did not apply to Sabrina.

2. *Sabrina*

> ACP asserts ownership of the Sabrina property on a number of grounds. The Court begins with the contention that DeCarlo's contributions to each were works for hire in consequence of which ACP owns the copyrights. (A-26)

* * *

First, the lynchpin of DeCarlo's contention that there indeed was an agreement or agreements to the contrary is the form of voucher agreement and the check endorsements to which reference already has been made. But he has produced no such agreement with respect to any *Sabrina* contributions. *Rather, he has adduced evidence that there were, or perhaps were, voucher agreements and check endorsements relating to his Sabrina contributions – all of which have been lost – and that their terms were "similar" or "identical" to the forms that he has proffered, at least so far as a couple of witnesses remember decades later.*

The best evidence rule ordinarily requires that the terms of a written instrument be proved by the instrument itself. Where, as here, the original instrument has been lost, its contents may be proved by other evidence. And that is what DeCarlo has sought to do. *The question is whether the evidence is sufficient to raise a genuine issue of material fact.* (A-27–A-28) (fns. omitted) (Emphasis added.)

* * *

There is considerable uncertainty as to the language of the forms of voucher agreement and check endorsements that were used in the 1960's when Sabrina was created and at any other time prior to the effective date of the 1976 Act. The evidence concerning the voucher agreement was that a form of voucher agreement has been used in the art department to pay for work produced for ACP, but there is no proof as to when that practice started. *One ACP witness testified that the form used in 2000 is "similar" to the 1981 version produced during discovery. Two freelance artists aver that they were required by ACP for many years to sign voucher forms containing language similar or identical to that on the 1981 version, although neither was able to quote or produce the language.*

The situation with respect to the check endorsements is similar. We have DeCarlo's handwritten copy of an endorsement he says he signed in 1970, but he was not able to say precisely what wording was used at various other points during his relationship with ACP. The only surviving check endorsed by DeCarlo (it bears the form of endorsement quoted above) is dated January 3, 1986, long after the effective date of the 1976 Act. The declaration of the two other artists that defendant has submitted are equally unilluminating. Mr. Bolling produced a form of endorsement used in 1980 that is identical to that on DeCarlo's 1986 check, which suggests that this particular form was in use at least during the period 1980 through early 1986. And Mr. Edwards avers that he signed hundreds of check endorsements over nearly four decades which were "similar" to that form, whatever that means.

In the last analysis, *it is DeCarlo's burden to produce evidence which, if credited, would permit a trier of fact reasonably to conclude, by clear and convincing evidence, that DeCarlo and ACP agreed that DeCarlo would own the copyright to his pre-1978 contributions to the Sabrina property notwithstanding the "almost irrebutable" presumption that these were works for hire.* While there is evidence as to a form of endorsement used in the period from 1980 until 1986 and as to a form of voucher agreement used in 1981, the Copyright Act provisions dealing with works for hire changed with the enactment of the 1976 Act. The evidence demonstrates also that the form of endorsement used in at least part of the 1980's differed from that which DeCarlo copied down in 1970, thus confirming that the language changed at least once in the 1970-1980 period. Beyond that, we have nothing as to the wording that was used either in the endorsements or in the voucher agreement at any

time prior to the effective date of the 1976 Act beyond conclusory assertions, decades after the fact, that it was similar or identical to that used later on.

In these circumstances, any determination by a trier of fact as to what the text was during the relevant period, even with the benefit of the vague testimony of Messrs. Edwards and Bolling, would be speculation. Hence, even assuming that knowledge of the language would answer the work for hire question, *DeCarlo has failed to sustain his burden of adducing admissible evidence which, if credited, would permit a rational finding, by clear and convincing evidence, as to the substance of that language. Indeed, the Court would reach precisely the same result under a preponderance of the evidence standard, as this Circuit does "not permit an issue to go to trial on the basis of mere speculation in favor of the party that bears the burden of proof."* "[A]n inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact (that is known to exist)." *The evidence before the Court does not permit a reasoned, logical decision as to the terms of any voucher agreements and check endorsements during the relevant period.* (A-29–A-32) (fns. omitted) (Emphasis added.)

* * *

The language of the 1970 endorsement copied down by DeCarlo does not even expressly acknowledge an assignment. The acceptance of the payment "for all of the undersigned's right, title and interest" in the enumerated works might have reflected a transfer of a limited right, whether one-time use or something else. *But it is equally plausible that it was in the nature of a quitclaim* – a transfer of DeCarlo's interest, *if any*, in the works – *or perhaps of common law copyright or possessory rights. It simply is not clear.* And the result in such a situation, *Playboy* teaches, is that

the presumption of a work for hire relationship prevails. (A-34) (Emphasis added.)

Cheryl Blossom Characters

A secondary ground for the Court's finding of the publisher's ownership of *Sabrina*, and the sole ground for the finding of the publisher's ownership of *Cheryl Blossom* were the two ACP contracts of 1988 and 1996, which are *both* silent on the issue of "model sheet" transfer or ownership. Those words never appear anywhere in either agreement.

In his Rule 56 statement of genuine issues of material fact, DeCarlo squarely challenged the applicability of the contracts:

> Did the 1988 or 1996 agreements transfer ownership of the copyrights in Mr. DeCarlo's original model sheet depictions of the Sabrina characters to ACP? (p. 8, *supra*)
>
> Did the 1988 or 1996 agreements transfer ownership of the copyrights in Mr. DeCarlo's original model sheet depictions of the Cheryl Blossom characters to ACP? (p. 8, *supra*)

Each of these DeCarlo statements of material issues for trial cited as evidence the contracts themselves, which were drawn by ACP and are ambiguous on their face. (See Joint Appendix in Court of Appeals at A-284, and related pages containing the actual contracts.)

But the District Court dealt with the contract ambiguity issue simply by sidestepping it and reaching its own decision as to what the contracts provided, thereby usurping the jury's classic role.

On the transfer of *Sabrina* from the artist to the publishers the Judge ruled:

> *Third*, the 1988 Agreement assigned to ACP all of DeCarlo's "rights, title and interest in the Existing

> Third Party Works heretofore submitted to Archie" and conveyed to ACP any rights that DeCarlo had in any of the comic strips and pages that he previously has "submitted to Archie," which included all of his *Sabrina* artwork. (fns omitted.) (Appendix, p. 34)

The District Court acknowledged that DeCarlo had prepared a model sheet for the Cheryl Blossom characters:

> Goldwater explained to DeCarlo that he wanted to create a "real sex symbol," a rich and snobby character, and he asked DeCarlo to draw her and her family. *DeCarlo drew a model sheet depicting a family as Goldwater had requested, chose the name Cheryl Blossom, and created Jason, Cheryl's twin brother, a girlfriend of Cheryl's and her parents.*

(A-14–A-15) (fns. omitted) (Emphasis added.)

Nevertheless, the District Court resolved the contract language ambiguity issue as to *Cheryl Blossom* by a factual determination that she was "part of the Archie family," never considering the factual difference between model sheets (not expressly mentioned in the contracts) and comic book pages (to which the contracts plainly apply). (See A-38)

Each of these bona fide and genuine issues of disputed material facts should have been sent to a trial jury. The District Court avoided the trouble of doing so by making his own inferences and findings of fact – simply disregarding the contrary evidence cited and supplied by DeCarlo.

CONCLUSION

WHEN DISTRICT JUDGES FOR CONVENIENCE DISPENSE WITH JURY TRIALS GUARANTEED BY THE CONSTITUTION THEY JEOPARDIZE THE IDEAL OF BLINDFOLDED JUSTICE

On December 14, 2003, *The New York Times* reported an ABA study of the frequency of civil trials in the federal court system:

In 1962, the study says, 11.5 percent of all civil cases in the federal court went to trial. By last year, that number had dropped to 1.8 percent. And even though there are five times as many lawsuits today, the raw number of civil trials has dropped, too. They peaked in 1985 at 12,529. Last year, 4,569 civil cases were tried in federal court.***

In 1962, the average federal judge conducted 39 trials a year, including both civil and criminal cases. These days, that number has fallen to 13. Judges spend the rest of their time doing such things as supervising the exchange of information between parties, deciding pretrial motions, and urging or approving settlements and plea bargains.***

But Gillian Hadfield, a law professor at the University of Southern California, said settlements might actually be in decline.

"We need to follow up on this initial study to confirm these numbers," Professor Hadfield said, "but at this point it looks as though the percentage of cases terminated in settlement has fallen by between 10 and 15 percentage points, from approximately 50 percent in 1970 to between 35 and 40 percent during the 1980's and 1990's."

By contrast, she continued, "nontrial adjudications" – written decisions by judges typically based only on papers submitted by the parties – have risen to 50 percent from 32 percent since 1970.***

Professor Arthur Miller of Harvard Law School commented on this trend:

"We speak glowingly of letting people have their day in court," he said. "Now they have their day on papers."

EDNY/SDNY Local Rule 56.1 (and its parallels in other districts) help to explain the trend toward "nontrial adjudications", and deserves this Court's intervention both because of the threat to Constitutional rights and also because of the need for public confidence in the fairness of the federal judicial system.

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.

The genius of the American jury system is that it assures the parties that their rights are not subject to subconscious bias or pre-conditioning.

Civil cases in the Second Circuit are usually assigned to a single District Judge for all purposes from start to finish (as in this case). When a party demands a jury trial (as in this case) but a jury never participates in the decision-making that results in depriving the party of the fruits of his life's work (as in this case) it is understandable that the losing party may wonder whether the trial judge's professional background in a major corporate law firm (as in this case) may have subconsciously developed an attitude that juries cannot handle complex commercial cases.

Those who crafted our Bill of Rights were well aware of the likelihood of such concerns of subconscious bias, and therefore took steps to eliminate them by offering litigants the option of trial by jury:

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves *both the appearance and reality of fairness,* "generating the feeling, so important

> to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. (Emphasis added.)
>
> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 241, 100 S.Ct. 161, 64 L.Ed.2d 182 (1980) (citing *Carey v. Piphus*, 435 U.S. 247, 259-62, 266-67, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); *Mathers v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 47 L.Ed.2d 18 (1996); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172, 71 S.Ct. 624, 95 L.Ed. 817 (1951).

Motions for Summary Judgment trespass on the assurances of impartial tribunals by eliminating jury trials. That is why developments like the EDNY/SDNY Local Rule 56.1, which shift away from juries to judge-made decisions, should be carefully evaluated to prevent abuses like those present in this case.

This Court should grant certiorari to examine the issue closely and exercise its supervisory power over the summary judgment process in the lower federal courts.

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